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No. 85-356

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES T. OMAN, FRED R. WALKER, WILLIE A. GIBBONS, and HUGH V. REYNOLDS,

Petitioners

v.

H.K. PORTER CO.
RAYMARK INDUSTRIES, INC., and
PITTSBURGH CORNING CORP.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
and
BRIEF OF HENDERSON & GOLDBERG, P.C. AS AMICUS CURIAE

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Pursuant to Rule 42(3) of the Rules of this Court, HENDERSON & GOLDBERG, P.C., by Thomas W. Henderson, Esquire, respectfully moves this Court for leave to file a brief amicus curiae in the above entitled

case. Counsel for respondents have declined to give their consent to the filing of a brief amicus curiae in support of petitioners' request for a writ of certiorari in the above entitled case.

Interest of Henderson & Goldberg, P.C.

The movant serves as plaintiffs' counsel in numerous asbestos-related cases which originate from the shipyards in and around Baltimore, Maryland and the Bath Iron Works in Bath, Maine which are pending at this time. The interests of these clients are directly affected by the Fourth Circuit decision in *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985) which denied the application of admirality jurisdiction in cases involving injuries to shipyard workers as a result of their contact with asbestos products while working on board ships in navigable waters. As a result, the court's decision to accept certiorari in this case will have a profound impact on the interests of movant's clients by deciding whether federal maritime law or state law governs their claims.

Conclusion

The submission of a brief amicus curiae in this matter, while serving the interests of movant's clients, can also serve to inform the Court that the scope of the interests involved is one of national importance that supercedes the individual parties to the action.

Respectfully submitted,

HENDERSON & GOLDBERG, P.C.

By

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BRIEF OF HENDERSON & GOLDBERG, P.C., AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae is set out in the Motion for Leave to File, *supra*.

THE QUESTION PRESENTED

I. Whether admiralty jurisdiction applies to tort actions for injuries (1) received on board ships, (2) by shipbuilders and ship repair workers, (3) from defective asbestos insulation products that (4) were essential to the operation of the ships and (5) intentionally designed, marketed and advertised for shipboard use.

STATEMENT

The facts surrounding this petition for a writ of certiorari to this Court are fully stated in Plaintiffs' Petition For a Writ of Certiorari at pp. 2-5, inclusive.

SUMMARY OF ARGUMENT

At issue in this appeal is the Fourth Circuit's decision in *Oman v. H.K. Porter, et al.*, 764 F.2d 224 (4th Cir. 1985) that admiralty jurisdiction does not apply to workers who have suffered injuries due to exposure to maritime asbestos products while working on board vessels in navigable waters. Amicus Curiae submit that by this decision and similar ones in various other circuits, the courts have used an overly narrow and mechanical test for determining the applicability of admiralty jurisdiction which ignores the obvious impact that these claims have on maritime commerce. As a result, the decision below is in direct conflict with the intent of this Court as voiced in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668

(1982) and *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) as to what constitutes a sufficient maritime "nexus" so as to support a grant of admiralty jurisdiction.

Based on the federal interest of providing a uniform body of law in order to protect maritime commerce, and the growing number of asbestos claims that have arisen as a result of shipyard exposure, this case raises a significant issue of federal concern which justifies review by this court.[1]

ARGUMENT

I. The Fourth Circuit In Straining to Exclude Asbestos-Related Cases From Admiralty Jurisdiction Has Misconstrued Supreme Court Precedent.

This Court in the case of *Executive Jet Aviation, Inc. v. City of Cleveland, supra*, stated that in order for admiralty jurisdiction to be applicable in a case it would not be sufficient for a party to prove merely that the cause of action arose in a maritime locality but that the wrong must also "bear a significant relationship to traditional maritime activity." *Executive Jet*, 409 U.S. at 268. By employing such a standard the court logically excluded from admiralty jurisdiction those actions which may have arisen from a maritime situs but whose substantive facts were devoid of a maritime subject matter. Such cases would have been heard in admiralty prior to *Executive Jet* by a court's following of a strict situs rule approach. *Id.* at 253.

Just as the *Executive Jet* opinion cautioned against using too broad a view of admiralty jurisdiction, this

1. The fact that accidents involving ship repairs has a direct impact on the federal interest in protecting maritime commerce is evident not only by the decisions of the Supreme Court but also by legislation such as the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. §901, et seq., and the Extension of Admiralty Jurisdiction Act, 46 U.S.C. §740.

Court in *Foremost Insurance Co. v. Richardson, supra,* held that the scope of admiralty jurisdiction is not to be limited only to commercial shipping but should include accidents involving pleasure craft as well because of the potential effect on maritime commerce. *Foremost Insurance,* 457 U.S. at 674-75. The approach underlying both the *Foremost Insurance* and *Executive Jet* decisions, therefore, is to avoid mechanical jurisdictional tests and view the applicability of admiralty jurisdiction in terms of the effect that the facts involved have on maritime commerce.

Consequently, the petitioners submit that the Fourth Circuit has missed the point of these Supreme Court decisions and has strained to narrow the scope of admiralty jurisdiction through its use of a "mechanical" four-part test in determining whether a sufficient maritime "nexus" exists. This test consists of analysis of: (1) the functions and roles of the parties to the suit; (2) the type of injury involved; (3) the types of vehicles and instrumentalities involved; and (4) the traditional concepts of the role of admiralty law. *Oman, supra,* at 231.

In its analysis, the Fourth Circuit did concede that the petitioners' injuries occurred aboard ships in navigable waters, while petitioners were installing and replacing specially manufactured maritime asbestos products. *Oman, supra,* at 230. The Court however deemed that a sufficient maritime nexus did not exist stating:

> Importance to maritime commerce by itself is not sufficient to bring an activity within the scope of admiralty jurisdiction . . . To be in admiralty the plaintiffs must have been doing what sailors normally do or used to do. *Id. Citations omitted.*

Such a view represents a complete misstatement of the law in that it subscribes to an unreasonably narrow standard for sustaining admiralty jurisdiction by limiting it only to cases where the parties are performing the duties

of sailors rather than by examining the total effect that the transactions have on maritime commerce. As a result, this approach ignores the holding of *Foremost Insurance* and its emphasis on applying admiralty jurisdiction when there is a potential effect on maritime commerce.

Additionally, even assuming that the "sailor's duties" standard was valid, the Court failed to recognize specific case law from its own circuit where the repair of asbestos insulation in maritime boilers was found to be within the normal duties of a seaman. *Vaughn v. Johns-Manville Corp.*, 662 F.2d 251 (4th Cir. 1981).

In further straining its opinion to avoid applying admiralty jurisdiction, the Fourth Circuit, when faced with the fact that plaintiffs sustained their injuries while working aboard ships, dismissed this issue stating "the involvement of ships is at most tangential to the nature of their tort claims and has no effect on the character of those claims." *Oman*, 764 F.2d at 231. Putting aside for the moment the obvious fact that maritime asbestos repair requires the workers to labor in especially cramped areas aboard ships where they are exposed to a higher concentration of asbestos fibers in the air than in similar land-based jobs,[2] the outright dismissal of the fact that the tort occurred on board ships is incongruous with the court's claim that its decision to deny admiralty jurisdiction is based on "the traditional concepts of the role of admiralty law." *See, John Baizley Iron Works v. Span*, 281 U.S. 222 (1930), where this Court held that "Repairing a completed ship lying in navigable water has a direct and intimate connection with navigation and commerce" in applying admiralty jurisdiction in a case involving injuries received by a painter from a co-worker's torch while working aboard ship. *Id.* at 232.

In forming its decision to exclude the injuries of maritime asbestos workers from admiralty jurisdiction,

2. *See*, Plaintiffs' Petition for A Writ of Certiorari at p. 12, n. 14.

the Fourth Circuit relied heavily on other Circuit Court decisions which had made similar jurisdictional determinations. Amicus Curiae submits that the decisions of *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir. 1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir. 1983); and *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967 (9th Cir. 1983), although consistent with one another, are in conflict with the decisions of this Court since they serve to unreasonably narrow the scope of admiralty jurisdiction by ignoring the impact that this growing area of tort law has on the maritime industry as a whole. Guidance from the Supreme Court therefore is necessitated in this instance to protect the significant federal interest involved in these cases.

CONCLUSION

The Fourth Circuit has attempted to unduly limit the scope of admiralty jurisdiction by excluding, along with various other Circuit Courts, a whole category of cases which have a sufficient maritime "nexus" and impact on commerce to support the application of admiralty jurisdiction. Due to the nature of the federal interest involved, it is therefore crucial that the Supreme Court address this issue by granting certiorari.

Respectfully submitted,

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